

ST 96-39

Tax Type: SALES TAX

Issue: Books and Records Insufficient
Unreported/Underreported Receipts (Fraud)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	
)	
v.)	No.
)	IBT#
)	NTL#
TAXPAYER,)	
)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES:

Mr. Martin Schwartz on behalf of TAXPAYER; Mr. Richard Rohner, Special Assistant Attorney General, on behalf of the Department of Revenue.

SYNOPSIS:

This matter comes on for hearing following the Department of Revenue's (hereinafter "Department") audit of TAXPAYER (hereinafter "Taxpayer"). As a result of such audit, the Department issued Notices of Tax Liability (hereinafter NTL) Nos. XXXXX and XXXXX for liability for Retailer's Occupation and related taxes pursuant to 35 ILCS 120/1 et seq. At issue in the instant proceeding are the following questions: 1) whether the taxpayer overcame the *prima facie* correctness of the aforementioned NTLs through the submission of evidence associated with its own books and records, and 2) whether the taxpayer is entitled to abatement of any fraud and other penalties assessed in the NTLs. Following the submission of all evidence and a review of the record, it is

recommended that this matter be resolved in favor of the Department on both issues.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence Dept. Gr. Ex. No. 1. Said group exhibit consists of two Audit Corrections and/or Determinations of Tax Due (hereinafter "Corrections of Returns"). The first assesses liability for the period January 1, 1992 through November 30, 1993 and indicates a total liability due and owing in the amount of \$23,219.00. The second assesses liability for the period December 31, 1993 through August 31, 1994 and indicates a total liability due and owing in the amount of \$10,329.00.

2. The Correction of Returns that pertains to the period ending November 30, 1993 includes a 30% fraud penalty. This penalty was based on under reported receipts. *Id.*; Tr. pp. 9-11, 24.

3. The Correction of Returns that pertains to the period ending August 31, 1994 includes the following penalty assessments: a 50% fraud penalty, based on under reported receipts;¹ a 15% late payment penalty; and a 5% late filing penalty. Tr. pp. 10, 24.

4. Taxpayer did not produce any of its own books and records, or evidence associated therewith, to rebut the Department's *prima facie* case. Tr. p. 27.

CONCLUSIONS OF LAW:

On examination of the record established this taxpayer has not demonstrated by the presentation of testimony or through exhibits or argument, evidence sufficient to overcome the Department's *prima facie* case. Accordingly, under the reasoning given below, the aforementioned NTLs should be affirmed in their entirety. In support thereof, I make the following conclusions:

¹The increase from 30% to 50% was mandated by the Uniform Penalty and Interest Act, 35 ILCS 735/3-1 et seq., which became effective January 1, 1994.

The Retailer's Occupation Tax Act, 35 **ILCS** 120/1 *et seq.* (hereinafter "ROTA") provides, in pertinent part, that:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable.

35 **ILCS** 120/7. Further, as a retailer, the taxpayer is required to keep books, records, papers and documents supporting the taxable nature of its sales. *Id.* The instant matter is one in which the taxpayer did not produce documentation to support the averred non-taxable nature of its sales.

Pursuant to Illinois statute and case law, the Corrections of Returns submitted as Dept. Group Ex. No. 1 are *prima facie* correct and constitute *prima facie* evidence of the correctness of tax due as shown thereon. 35 **ILCS** 120/4; A.R. Barnes and Co. v. Department of Revenue, 173 Ill. App.3d 826 (1st Dist. 1988).² Once the Department establishes the *prima facie* correctness of the amount of tax due via admission into evidence of the aforementioned Corrections of Returns, the taxpayer must show that such documents are incorrect. *Id.* And, in order to overcome the presumption of validity attached to the Department's corrected returns the taxpayer "must produce competent evidence, identified with their books and records showing that the Department's returns are incorrect." Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App.3d 11 (1st Dist. 1978). Oral testimony, standing alone, is not sufficient to overcome the *prima facie* correctness of the Department's determinations. A. R. Barnes, *supra*.

The instant record is completely devoid of any documentary or other evidence associated with the taxpayer's books and records. Therefore, based on the aforementioned statutes and case law, I conclude that the taxpayer has

².See also, Pilsen Food and Liquor, Inc. v. Department of Revenue, 93 L 50517 (1st Dist. 1986) and cases cited therein.

failed to rebut the *prima facie* correctness of the Corrections of Returns. Consequently, such Corrections must stand as a matter of law.

Taxpayer seeks abatement of the fraud penalties by arguing, without supporting evidence, that the auditor was biased. It also submits, by means of cross-examination, that the auditor failed to interview its employees or review any of the Taxpayer's books and records except filed sales tax returns.³

These tactics parallel those employed by the appellant in Masini, where the court noted that "simply questioning the Department of Revenue's return or denying its accuracy does not" overcome the Department's *prima facie* case. Masini, *supra* at 16. The court further noted that, absent appropriate documentary evidence, such questioning constituted "no more than a bare challenge to the Department's return." *Id.* On this basis, the Masini court held that the appellant's challenge was legally insufficient to rebut the Department's *prima facie* case which, similar to the present case, included an assessment of penalties.

In Pilsen Food and Liquor, Inc. v. Department of Revenue, 93 L 50517 (1st Dist. June 28, 1996), the appellate court affirmed a fraud penalty based on under-reported sales. The Pilsen court based its conclusion on two key findings made by the Administrative Law Judge: First, that the appellant "engaged in a course of conduct misrepresenting its sales and receipts for over two years;" and second, that the testimony of the appellant's only witness lacked credibility. Pilsen, *supra* at 7. Based on these findings, the court held that the under reporting "raised the inference of intent and fraud, not mere mistake." *Id.*

Like Pilsen, the instant case involves an assessment of fraud penalties based on under reported receipts. Inasmuch as this taxpayer presented absolutely no evidence to refute this assessment, I am compelled to find the Department's evidence thereof completely credible. Furthermore, I must find

³.See Tr. pp. 20-21.

that the taxpayer failed to rebut the aforementioned inference of fraud associated with the under reported receipts. Consequently, I conclude, as did the Pilsen court, that the taxpayer is not entitled to abatement of the fraud penalties as a matter of law.

WHEREFORE, for the reasons set forth above, it is my recommendation that NTL Nos. XXXXX and XXXXX, be finalized as issued.

Date

Alan I. Marcus,
Administrative Law Judge